

Docket No. 154,448

On the 2nd day of November, 1995 the application of claimant for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey on June 28, 1995, came regularly on for oral argument.

Claimant appeared by and through his attorney, James Yates of Merriam, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Timothy G. Lutz of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Jeff K. Cooper of Topeka, Kansas. There were no other appearances.

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Is claimant entitled to temporary total or temporary partial disability compensation at the rate of \$211.83 per week for a total of 117.75 weeks between January 12, 1991 and May 23, 1994, or any part thereof, during which time claimant was unable to work full time?
- (2) Is claimant entitled to permanent partial disability compensation for the injury to his right shoulder?
- (3) What, if any, is the nature and extent of claimant's injury and/or disability for his right shoulder and low back?
- (4) Should respondent be required to pay the cost of medical treatment furnished to the claimant by the Veterans Administration Medical Center, University of Kansas Medical Center and Dr. John Sayegh?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds claimant is not entitled to additional temporary total or partial disability compensation during the period of January 12, 1991 to May 23, 1994. Claimant, during this time, received temporary total disability compensation, several weeks of unemployment compensation and was employed full time on two (2) separate occasions with different employers. The evidence does not support a finding that claimant was temporarily and totally disabled at any time beyond the period for which he was paid temporary total disability benefits.

The Appeals Board finds claimant is not entitled to an award for the injury alleged to his right shoulder while in the employ of respondent. Claimant alleges injury on August 24, 1990. The injury claimed is to his low back and to his right shoulder. Claimant alleges, while unloading a truck for the respondent and carrying boxes of strawberries, he slipped and fell injuring his low back. Claimant further alleges that while falling, he attempted to catch himself with his right arm, causing injury to his right shoulder. The description of claimant's accident has varied significantly throughout this litigation. The description provided by claimant of grabbing with his right arm in order to break his fall was not provided to the health care professionals immediately after his injury. Claimant also had the opportunity to testify at both of the Preliminary Hearings of February 17, 1992 and April 27, 1992. The description of claimant's slip and fall injury to the right shoulder is not contained in either of these transcripts. The first testimony provided by claimant of injury to his right shoulder occurred at the Preliminary Hearing of May 5, 1993.

It is also significant that the medical reports do not mention claimant's shoulder except for a brief mention on October 1, 1990, several weeks after the first injury. Claimant neither sought nor received medical treatment to his shoulder for over two (2) years after the date of injury.

In workers compensation matters, it is the burden of claimant to prove by a preponderance of the credible evidence his entitlement to benefits. See K.S.A. 44-501 and K.S.A. 44-508(g). The Appeals Board finds claimant has failed in his burden of proving that the injury sustained to his right shoulder occurred out of and in the course of his employment with the respondent and, as such, benefits to the right shoulder injury are denied.

The parties stipulated into the record that claimant sustained a functional impairment of eighteen and seventy-five hundredths percent (18.75%) whole body impairment to the back as a result of the injury on August 24, 1990. The issue between claimant and respondent is regarding what, if any, work disability claimant has suffered.

Dr. Edward Prostic, in his report of October 7, 1991, found the work restrictions placed upon claimant after the 1990 date of injury were less than those given to claimant by Dr. Overesch in 1989. Michael Dreiling, Director of the Menninger Return to Work Center, after being provided the opinion of Dr. Prostic, felt that the lack of modification of claimant's work restrictions after the 1990 incident would have resulted in no loss of access to the open labor market and no loss of ability to earn a comparable wage. K.S.A. 1990 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board finds the testimony of Dr. Prostic and Mr. Dreiling to be persuasive.

In finding claimant has suffered no loss of access to the open labor market and no loss of ability to earn a comparable wage the Appeals Board is statutorily mandated to award the claimant no less than his functional impairment. The parties, in stipulating to an eighteen and seventy-five hundredths percent (18.75%) whole body functional impairment as a result of injuries to claimant's back, have dictated the Board's decision in this regard. Claimant is awarded an eighteen and seventy-five hundredths percent (18.75%) whole body disability as a result of the injury suffered to his back on August 24, 1990.

Claimant received medical care from the Veterans Administration, the University of Kansas Medical Center, Dr. John Sayegh and also Dr. Roger Hood. The Special Administrative Law Judge found these charges to be noncompensable, as they stem from treatment not related to claimant's injury. The Appeals Board, in reviewing the medical evidence, agrees with and adopts the finding of the Special Administrative Law Judge and denies claimant reimbursement for the medical provided by Dr. Roger Hood, the Veterans Administration Medical Center, University of Kansas Medical Center and Dr. John Sayegh.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated June 28, 1995, shall be, and is modified, and claimant is granted an award against the respondent, its insurance carrier and the Kansas Workers Compensation Fund for an 18.75% permanent partial general body disability as a result of the injury he suffered to his back on August 24, 1990.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDING IN FAVOR of the claimant, Richard E. Bussell, and against the respondent, A. Reich & Sons, Inc., and its insurance carrier, Insurance Company of North America, and the Kansas Workers Compensation Fund, for an accidental injury which occurred August 24, 1990, and based upon an average weekly wage of \$353.83 for 415 weeks permanent partial general body disability at the rate of \$44.23 per week, totalling \$18,355.45. As of November 9, 1995, claimant is entitled to 271.86 weeks permanent partial disability compensation at the rate of \$44.23 per week in the amount of \$12,024.37, followed thereafter by 143.14 weeks of permanent partial general body disability at the rate of \$44.23 per week in the amount of \$6,331.08 until fully paid or further order of the Director.

The issues regarding claimant's average weekly wage and the respondent's entitlement to credit under K.S.A. 44-510a, while being before the Special Administrative Law Judge, were neither appealed to nor argued before the Appeals Board. As such, the findings of the Special Administrative Law Judge in this regard, are affirmed and claimant is found to have an average weekly wage of \$353.83, and respondent is denied credit under K.S.A. 44-510a.

Future medical is awarded upon proper application to and approval by the Director.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of an itemized statement to verify same.

All compensation, medical expenses and administrative costs are to borne 25% by the respondent and 75% by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is herein approved insofar as it is not in contravention of K.S.A. 44-536. The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed 25% to the respondent and 75% to the Kansas Workers Compensation Fund to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Achten Reporting Service Transcript of Preliminary Hearing (4-27-92)	\$175.80
Curtis, Schloetzer, Hedberg, Foster & Associates Transcript of Preliminary Hearing (2-17-92)	\$245.60
Transcript of Preliminary Hearing (5-5-93)	\$238.30
Transcript of Regular Hearing	\$335.80
Metropolitan Court Reporters Transcript of Continuation of Regular Hearing	\$933.80
Deposition of Edward J. Prostic, M.D.	\$261.30
Deposition of Larry F. Frevert, M.D.	\$515.90
Deposition of Michael J. Dreiling	\$557.40
Deposition of John I. Aiken, M.D.	\$339.10
Hostetler & Associates Deposition of John A. Sayegh, M.D. (11-7-94)	\$319.35
Deposition of John A. Sayegh, M.D. (11-9-94)	\$311.20
Deposition of Harry B. Overesch, M.D.	\$302.05
Deposition of James M. Smith, M.D.	\$468.40
Deposition of Bud Langston	\$338.80

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James Yates, Merriam, Kansas
Timothy G. Lutz, Overland Park, Kansas
Jeff K. Cooper, Topeka, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director